

Supreme Court, U.S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978.

No. 78-1610

UNITED AIR LINES, INC.,

Petitioner,

vs.

LIANE BUIX McDONALD,

Respondent.

**PETITIONER'S REPLY TO BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI.**

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I.

The Tolling Event.

A. In response to the first question raised in the Petition, respondent denies that the Court of Appeals held that the filing of a similar charge with the EEOC by any person, and not only by the named class plaintiff, would be the event which commences a class action. Opp. Br. 6. Although the Court of Appeals looked to the filing by two specifically named persons who had intervened on their own behalf after class status denial, the Court added: "However, discovery may reveal that an earlier date is appropriate. . . . [D]iscovery might turn up a prior EEOC charge, thus resulting in a different tolling date." The

Court suggested as a possibility the charge which may have been filed by a person whose claim had been brought and settled before the New York State Division of Human Rights. Pet., App. A9 n. 10; 587 F. 2d 357, 361 n. 10; Pet. 14.

B. Respondent also argues that there is no conflict between the decision below and the many cases cited in the Petition to the effect that the tolling event is the filing of the EEOC charge by the named class plaintiff (Pet. 10-12). She claims that these cases "merely recite the settled rule which limits participation in class actions to absent class members who could still have timely filed themselves when the tolling charge was actually filed." This is precisely what the Seventh Circuit held, claims respondent, when it limited the class to those terminated within 90 days of the Whitmore and O'Connor charges (neither a named class plaintiff), which charges it had found to be the tolling charges. Opp. Br. 8.

This is a non sequitur. The issue is what is the tolling event, not what consequences flow from the event. The cases cited in the Petition state unequivocally that it is the filing of the charge by the named class plaintiff which is the tolling event—not that filed by a putative, unnamed, potential class member. "But Wetzel and Ross [the named class plaintiffs] cannot represent those who could not have filed a charge with the EEOC at the time they filed their charges." *Wetzel v. Liberty Mutual Insurance Co.*, 508 F. 2d 239, 246 (3d Cir. 1975), *cert. denied* 421 U. S. 1011. (1975).

Respondent supports the efforts of the Court below to distinguish the Ninth Circuit's decision in *Inda v. United Air Lines*, 565 F. 2d 554 (9th Cir. 1977), another class action arising out of United's former no-marriage policy. Opp. Br. 8 n. 2. The Court of Appeals here distinguished *Inda* on the ground that it "involved an attempt by two individuals who had never filed timely complaints with the EEOC or a state agency to use the filing of other individuals to establish their right to sue." Pet. App. A8 n. 9; 587 F. 2d at 361 n. 9. However, the named

plaintiffs Inda and Moritz had in fact filed their own charges and their suit was permitted to stand. They attempted to rely on the earlier Sprogis and Romasanta EEOC charges as the tolling event to expand the time frame of the putative class to 90 days before the filing of the earlier charges. This the Ninth Circuit refused to allow: "We conclude that the 90 day statute was not tolled by the filing of charges by other than Inda and Moritz [the named plaintiffs]." 565 F. 2d at 559. The conflict is clear.

II.

The Scope of the Class.

With respect to the second question presented in the Petition—whether the class to be certified on remand after this Court's earlier decision in this case could include a subclass not requested by the named plaintiffs—respondent apparently does not deny the proposition that as intervenor she must take the case as framed by the original plaintiffs. The vice in our position, she contends, is that we misrepresented what the named plaintiffs had requested.

A. Respondent concedes that the two subclasses as described in our Petition were requested in the *Sprogis* case. See Pet. 4. But, respondent claims, it is "more than 'slightly misleading'" for us to represent that these were the same subclasses requested in this case. Opp. Br. 12.

The fact is the same counsel represented the plaintiffs in *Sprogis* and in this case, they moved to consolidate the two on the grounds they were the same, and moved the same class be certified in the consolidated case. This course of action and the class sought are described in the original plaintiffs' Petition for Permission to Appeal the class status denial in 1972. This document is set out in full in the Appendix to the first *McDonald* case in this Court, No. 76-545, App. 62-72.

Respondent suggests, in effect, that when the named plaintiffs sought to consolidate the *Sprogis* and *Romasanta* cases, they

had in mind one class for *Sprogis* and another for *Romasanta*. The proposition is absurd on its face and simply was not what was sought. To belabor the obvious, we include as Appendix A to this Reply the proposed Order of consolidation and class certification submitted by the original named plaintiffs in 1972. The subclass relating to stewardesses who resigned is limited to those "who have complained against United's no-marriage rule by filing grievances under a collective bargaining agreement between United and the Air Line Pilots Association or by filing charges under Title VII or under other federal or state laws, regulations, or executive orders banning discrimination in employment because of sex." *Infra*, A2.

B. Respondent quotes two sentences from a memorandum filed by the original named plaintiffs to support her argument that a different class was indeed requested in this case from that proposed in *Sprogis*. Opp. Br. 12. The quotation does not support the conclusion that such a class was being proposed. To the contrary, the very document upon which respondent relies states at the outset that this suit "was framed as a class action to secure relief for the class of Stewardesses similarly situated with the Plaintiff in *Sprogis v. United Air Lines* . . ." *Infra*, A4. The memorandum then sets out again the two subclasses precisely as we have described them. Since intervenor has conceded in her Opposition Brief that the class sought in *Sprogis* did not include a subclass of stewardesses who resigned without protest, the statement by the original named plaintiffs of the purpose of this suit should end any possible dispute about the class sought in this case. Again, to remove any question of precisely what the named plaintiffs stated in that memorandum, we set out in Appendix B to this Reply the first three pages of that document wherein the plaintiffs state the identity of the classes in *Sprogis* and this case. *Infra*, A4.

C. In an effort to buttress her contention that this case always involved the broad class she sought after remand, respondent describes her motion to intervene after dismissal of

the suit in 1975: "Respondent . . . then sought to intervene to appeal the class order which had excluded her and other 'non-protesting' women who had resigned or were terminated under the rule from a remedy for petitioner's unlawful employment practice." Opp. Br. 4. What respondent described as her purpose in intervening in 1975 is not quite what she now states. Her Petition to Intervene is set out in full in the Appendix in No. 76-545 at pages 93-5. In that Petition the suit is described as one brought on a class basis on behalf of former stewardesses "who were discharged by United." Respondent described herself as one "discharged by United." Her intervention petition claimed that the district court's order denying class action status "excluded from this action all persons who had been discharged." Finally, her petition stated she sought to appeal the trial court's ruling "regarding the exclusion of petitioner and all persons similarly situated." There is not a single reference, implicit or explicit, in the Petition to Intervene to persons who resigned.*

D. Respondent refers to this Court's decision in *Evans v. United Air Lines*, 431 U.S. 553 (1977), and observes that "It is too late in the day for petitioner to retract its characterization in *Evans* of a resignation compelled by the unlawful rule as having been 'involuntary,' or to argue that involuntary resignees were not injured by the rule." Opp. Br. 10.

Evans arose on United's motion to dismiss on jurisdictional grounds, and therefore *Evans'* allegation that she was forced to submit her resignation and that this was a violation of Title VII had to be accepted as true. This was no concession by United that resignations unaccompanied by protests were in violation of Title VII. But more to the point, *Evans* is irrelevant to what class the plaintiffs sought to represent in this case. Whether a proper class action could be brought on behalf of

* By the time respondent sought to intervene in 1975, the claims of those who had resigned and protested had been fully settled. Pet. 17.

stewardesses who resigned because of the no-marriage policy absent a protest of that policy is beside the point. That is not the class which the named plaintiffs requested here.

E. Respondent states that the class directed to be certified by the Court of Appeals—*i.e.*, all former stewardesses whether resigned or discharged—is consistent with United's position in the district court. Opp. Br. 10. Respondent comes to this by quoting part of a sentence from one of United's briefs in the district court, but omitting that part of the sentence which limits the suggested class to those who resigned *and* who protested—precisely the position taken by the named class plaintiffs. See Pet. 17 n. 15.

Respondent has made this assertion repeatedly since this case was remanded by this Court, and each time we have pointed out the error. It is disappointing to see this inaccuracy repeated by respondent in her Brief in Opposition. Yet respondent charges us with "a misleading factual presentation" (Opp. Br. 6), "a seriously misleading recitation" (Opp. Br. 9), "a factual presentation . . . contrary to what occurred" (Opp. Br. 11), and "misrepresent[ation]" (Opp. Br. 13). The temptation is great to respond more fully to respondent's intemperate attacks. But this is at bottom a diversion from the issues raised in our Petition.

F. Respondent notes that in its decision holding that the class to be certified must include a subclass of stewardesses who resigned without protest, the Court below stated that it was doing no more than reaffirm what it had decided two years previously when this case was first before it *sub nom. Romasanta v. United Air Lines*, 537 F. 2d 915 (7th Cir. 1976). Opp. Br. 5. Although the Court of Appeals now says that it was reaffirming what it said in its first opinion, the fact is the earlier opinion contains not a single reference to stewardesses who resigned. To the contrary, the suit was described in that opinion as one on behalf of "other United stewardesses who were similarly discharged." 537 F. 2d at 917.

Indeed, in its first opinion the Court of Appeals set out the size of the class in such a way as to make clear that it was explicitly excluding resignees. It defined the class as including Ms. McDonald and "140 other stewardesses." (*Id.*) The Court explained that it had derived this figure from McDonald's statement in her brief that the district court had excluded her and 140 others similarly situated from the class and from the EEOC's statement in its brief that "United fired as many as 160 women pursuant to its no-marriage policy. . . . [A]pproximately 1828 United stewardesses resigned because of marriage".* Thus, the Court's own definition of the class as including 140 discharged stewardesses and its exclusion of the 1828 resignees shows beyond question that the Court below in its prior decision assumed the class included only flight attendants who had been discharged.

The record is clear that the original named plaintiffs limited their subclass relating to stewardesses who resigned to those who protested. This was not an inadvertence or an oversight. They meant not to include other resigned stewardesses and explained their reason:

The limitation of Class II plaintiffs to those who have protested the defendant's illegal policy by the filing of some type of grievance or charge gives further assurance that the person included within the class resigned against their will because of defendant's policy rather than for any other reason. (See Pet. 16-17.)

* The ultimate source of these figures is a computer printout provided by United which lists stewardesses who were discharged for any reason and who resigned for any reason between 1965 and November, 1968. United argued that the 140 figure was too high because it included stewardesses who had been discharged for all reasons, not just marriage, and that 30 was a more accurate estimate of the size of the class. The class claimed in the complaint was "approximately twenty-seven or twenty-eight."

Respondent offers no answer to this clear statement by the original named plaintiffs. It was error for the Court to require the certification of a class including a subclass not requested and specifically disclaimed by the original named plaintiffs.

Respectfully submitted,

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May 1979.

APPENDIX A.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

MARY BURKE SPROGIS,	} <i>Plaintiff,</i>	Civil Action No. 68 C 2311
vs.		
UNITED AIR LINES, INC.,	} <i>Defendant.</i>	

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN, on behalf of themselves and all others similarly situated,	} <i>Plaintiffs,</i>	Civil Action No. 70 C 1157
vs.		
UNITED AIR LINES, INC.,	} <i>Defendant.</i>	

ORDER

The Court has read and considered the Motion of Plaintiffs to consolidate Causes and the Memoranda of the parties setting forth their positions with respect thereto. The Court has also read and considered the extensive briefs and documents filed by the parties on the issue of whether the relief afforded in the *Sprogis* case should be extended to encompass other stewardesses similarly situated and, if so, the identity of the groups or classes (Original Plaintiff's Proposed Consolidation and Class Order, filed June 1, 1972.)

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which should be eligible for such relief. The Court has also had the benefit of the oral arguments of counsel.

The Court is of the opinion that the Plaintiffs' Motion for Consolidation should be granted. The Court is further of the opinion that the relief afforded in the *Sprogis* case should be made available to other stewardesses as proposed by Plaintiff *Sprogis*.

IT IS THEREFORE ORDERED:

A. Civil Action No. 68 C 2311, *Sprogis v. United Air Lines, Inc.*, and Civil Action No. 70 C 1157, *Romasanta et al. v. United Air Lines, Inc.*, be, and they hereby are, consolidated.

B. The relief afforded in the *Sprogis* case be, and it hereby is, made available to the following groups:

I. All persons employed by United Air Lines, Inc. as Stewardesses who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968; and

II. All persons employed by United Air Lines, Inc., as stewardesses who resigned from their employment upon their marriage between July 2, 1965 and November 7, 1968, as required by United's no-marriage policy, and who have complained against United's no-marriage rule by filing grievances under a collective bargaining agreement between United and the Air Line Pilots Association or by filing charges under Title VII or under other federal or state laws, regulations, or executive orders banning discrimination in employment because of sex.

C. This cause is set down for a further pre-trial conference on at o'clock, for the purpose of discussing and determining the further proceedings necessary for an orderly disposition of the issues herein, including possible discovery, Master's Hearings, etc. The parties may present any

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motions they consider proper with respect to discovery at that time.

Enter:

.....
J. S. PERRY, J.

Dated:

APPENDIX B.

UNITED STATES DISTRICT COURT
For the Northern District of Illinois
Eastern Division

CAROLE ANDERSON ROMASANTA and BRENDA BAILES ALTMAN,	} Plaintiffs,	Civil Action No. 70 C 1157
vs.		
UNITED AIR LINES, INC., a corporation,	} Defendant.	

PLAINTIFFS' OBJECTIONS TO DEFENDANT'S
PROPOSED ORDER STRIKING CLASS
ACTION ALLEGATIONS

Preliminary Statement

The complaint in this case was filed on May 15, 1970. The action was framed as a class action, to secure relief for the class of Stewardesses similarly situated with the Plaintiff in *Sprogis v. United Air Lines, Inc.* (Civ. No. 68 C 2311), which case had not been pleaded initially as a class action. At the time the complaint in the present case was filed, this Court had granted the Plaintiff's motion for summary judgment in the *Sprogis* case (January 21, 1970), and Defendant United Air Lines had filed a petition for leave to appeal to the Court of Appeals.

On September 25, 1970, while the Defendant's appeal to the Seventh Circuit Court of Appeals was pending, this Court

(Filed November 10, 1972.)

entered an order placing the *Romasanta* case on the passed case calendar. The Court so acted because *Sprogis* and *Romasanta* presented similar issues. The Court of Appeals entered its order affirming this Court's ruling in *Sprogis* on June 16, 1971, and United thereafter filed a Petition for Certiorari in the United States Supreme Court. On September 28, 1971, this Court's ruling in *Sprogis* having been affirmed, the Plaintiffs filed a motion asking that the Court set a hearing to determine the scope of the class in *Romasanta*. On October 18, 1971, this Court continued the Plaintiffs' motion and ordered that the case be returned to the passed case calendar. On December 14, 1971, the Supreme Court denied the Defendant's Petition for a Writ of Certiorari in *Sprogis*.

Upon the remand of *Sprogis* to this Court by the Court of Appeals, the Plaintiff in *Sprogis*, on February 15, 1972, filed a memorandum on the scope of the class entitled to relief, urging that in the *Sprogis* case the Court enter an order determining that the relief afforded the individual plaintiff in that case should be made available to the following two groups of persons, that question having been left open in this Court's decree of January 21, 1970:

CLASS I:

All persons employed by United Air Lines, Inc. as stewardesses who were discharged by United pursuant to its no-marriage policy between the dates of July 2, 1965 and November 7, 1968.

CLASS II:

All persons employed by United Air Lines, Inc., as stewardesses who resigned from their employment upon their marriage between July 12, 1965 and November 7, 1968 as required by United's no-marriage policy, and who complained against United's no-marriage rule by filing grievances under a collective bargaining agreement be-

tween United and the Air Line Pilots Association, or by filing charges under Title VII of the 1964 Act or under other state or federal laws, regulations, or executive orders banning discrimination in employment because of sex.

The Plaintiffs in both cases also moved to consolidate *Sprogis* and *Romasanta*. On June 14, 1972, this Court entered its order continuing *Sprogis* as an individual action only and denying the motion to consolidate. The Court stated as a reason for declining to broaden the *Sprogis* case that to convert *Sprogis* to what amounted to a class action, after the merits had been decided (notwithstanding the reservation in the original order of the possibility of doing so), would be to sanction one-way intervention, a step which the Court deemed to be unjust. The Court then stated, "The views of the court set forth herein are in no way prejudicial to the eventual disposition of the *Romasanta* case on its merits."